Not Quite Paradise

Forty Sexual Orientation Cases Decided by the Dutch Equal Treatment Commission between 1994 and 2001

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> **Note:** The text of the Dutch anti-discrimination legislation (plus English translations) can be found at my website (see: www.emmeijers.nl/waaldijk), which also contains an overview (in Dutch) of all cases discussed here (with links to the full texts of the Commission opinions). The numbers in square brackets refer to the opinions of the Equal Treatment Commission (published on: www.cgb.nl).

Introduction

Signore, signori, “che bisogno c’è di leggi in paradiso?”, this could have been the title of my talk, “do we need laws in Paradise?”. Since you all know, the Netherlands, as far as law and homosexuality is concerned, has been resembled to Paradise, Heaven or similar places, and probably from today or tomorrow it will be slightly less untrue because the Queen is expected to sign a royal decree that from the 1st of April you can marry, well *we* can marry in the Netherlands. For foreigners it will be a bit more difficult: at least one of them needs to be Dutch or resident there.

Put more generally, the question is: What is the use of an antidiscrimination law in a country where things were so advanced that you could get an antidiscrimination law? The legal and social situation of lesbians and gays in the Netherlands has been making a lot of progress and is indeed among the better in Europe, if not the best in the world. Consequently, antidiscrimination legislation could come about quite early. In 1983 (i.e. in the beginning of the twenty year period just indicated by Daniel Borrillo) the Dutch Constitution was renewed. Since then, sexual orientation is implicitly covered in its antidiscrimination clause (Article 1). In 1992 we got explicit mention of sexual orientation in the antidiscrimination provisions of the Penal Code, and in 1994 we got the General Equal Treatment Act, covering many grounds including sexual orientation. So in these fields, indeed, there has been a lot of progress in the Netherlands.

The Equal Treatment Commission

A peculiar thing of this General Equal Treatment Act of 1994 is that it established the Equal Treatment Commission. (for a discription see: http://www.cgb.nl/commission_frameset.html) So as far as I know, certainly until Sweden appointed Hans Ytterberg as an ombudsman for those sort of things, it has been the only body in Europe specifically dealing, among other things, with sexual orientation discrimination. It has been sitting since September 1994, and produced some 700 opinions, including more case law on sexual orientation discrimination (if you can call its non-binding opinions "law") than any court in Europe and probably than any court in the world.

I will be focusing on the work of the Commission here. It is somewhat like a court, but more informal; there are no formal rules of evidence, there are no requirements to bring your lawyer and no formal ways how to deal with the procedure.

Secondly it is more activist than a court would be; so if you are there without a lawyer, the Commission will take over a bit of the task of supporting you with making sense of your arguments.

Its decisions are opinions and they are not legally binding, although in several cases the decisions of the Commission have then been followed by the company or other institution which had been found to be discriminating, voluntarily. And in a few cases a court has reaffirmed decisions of the Commission. Only in one or two instances, in this field at least, a court has given a different opinion. Therefore, it produces non-binding but somewhat effective decisions.

A fourth characteristic of the Commission is that it has a fairly narrow competence. Apart from some small additional tasks, its main task is to give opinions: at the request of bodies who think they might be discriminating, but mostly at the request of people who think they themselves have been discriminated against. That competence is further narrowed by the exclusion of many areas of law and society from the competence of the Commission. For example, it can hardly say anything about governmental action, so the whole terrain of family law and immigration law, all of tax law and social security law is beyond the competence of the Commission. Basically, it can only say something about discrimination in the fields of employment and of the provision of goods and services. Also absent from its competence are types of verbal discrimination (incitements, derogatory remarks). Such verbal abuse of homosexuals or other minorities can amount to criminal offences in the Netherlands, but complaints cannot be heard by the Commission; only the public prosecutor can take action..

Nevertheless, the Commission has had far more cases of (suspected) sexual orientation discrimination to deal with than the courts in the last seven years. There were a few cases related to family law, one or two in the immigration field, and four criminal cases about derogatory remarks about homosexuality. Three of the latter were lost, on grounds of freedom of religion or freedom of speech; only one person was convicted of using insulting language about homosexuals (by calling some police officers "filthy homos"). It seems that criminal laws are not so important in this field.

Opinions about sexual orientation, civil status and transsexuality

Less than 6% of the total output of the Commission is about (claims of) sexual orientation discrimination: 40 opinions so far. In addition to that, there have been over 25 cases which are just about civil status (another ground covered by the General Equal Treatment Act). There are two types of cases in that group; one is discrimination against unmarried partners, and that can be indirect anti-homosexual discrimination, as Mark Bell pointed out earlier today. Secondly there is a number of cases of indirect discrimination against single people, who felt discriminated against because they did not have a partner. In the Netherlands that is sometimes seen as a gay issue, because supposedly many gays and lesbians are single.

What about transsexuals? In the Netherlands, even before the Court of Justice of the EC ruled on it, it was found that discrimination against transsexuals falls under gender discrimination, rather than under sexual orientation discrimination. So using the ground of sex, complaints about anti-transsexual discrimination can be brought before the Commission. That has happened six times in seven years. Four of these cases were employment cases, and only one of these was successful; in the other three the complaining transsexuals failed to convince the Commission that the employment really had been refused or taken away because of transsexuality or gender reassignment. The one case [98-12] which was successful, was quite straightforward from an evidence point of view because there the employer claimed he had had to transfer the transsexual employee to another part of the company against her will because, because her colleagues were harassing her. The Commission ruled that, no, he had had do something about the colleagues and not move the transsexual involved. This was a successful employment case, which is a rare occurrence at the Commission, as we will see later. Of the two other cases [98-107; 98-50] about

transsexuality, one [98-50] was brought by the Amsterdam Gay Games 1998 organisers, who feared that they might be discriminat against transsexuals in their guidelines on how to distinguish between male and female competitors. The found these rules to be discriminatory indeed. The final case was brought by a person who identified as transgender rather than transsexual, and he claimed non-surgical medical treatment as if he were a transsexual. This the hospital refused because he had not been diagnosed as being transsexual. The Commission gave as its opionion that this was not unlawful discrimination, because the refusal was based not on the ground of transsexuality (sex), but on the ground of diagnosis, which ground is not covered by the General Equal Treatment Act. Similar medical quirks, being used by the Commission to reject claims of discrimination, have also appeared in its case law in some gay cases, as we will see.

I will now concentrate on the 40 sexual orientation cases. Almost all of these (38) were about discrimination against homosexuals, the other two [00-90; 99-13] were about discrimination against heterosexuals. That is possible also (and forbidden, too).

Employment cases - getting or losing a job

Of these 40 cases, 25 had to do with employment. So in that way the Framework directive of the European Community seems to be on the right track, in singling out employment as the core area in which discrimination needs to be fough. The other 15 cases were about goods and services, mostly services.

Of the 25 dealing with employment 8 were about getting or losing a job, and they almost all failed because of lack of evidence. In none of these cases the complainants managed to convince the Commission that sexual orientation was the decisive or even a contributory reason in the decision not to hire or to promote or in the decision to dismiss. Several of these cases seem to have been about controversial employees who had behaved somewhat unwisely, either at work, or in procedures with respect to their employment. When reading their cases, you get the impression that, perhaps, if they had been heterosexual and not done certain stupid things, or not been such controversial characters, they might still have had the job. But the Commission clearly did not think they had enough evidence to conclude that the person involved had been not reappointed or not hired because of their sexual orientation.

Only the eighth case [99-38] was successful, but that is also a very strange case, as the discrimination did not actually take place. Here the case was not brought by someone who felt discriminated against, but by a school body which wanted to assert its right to deny employment to gay and lesbian applicants. In actual fact, this school body (heading a strict protestant section of a larger federation of Christian schools) had been overruled by the superior governing board. So the gay man in question did get the job. Still the strict protestant school body that recommended against appointing him, put the case before the Commission. This was a good thing, because the whole debate of the 1980s and early 1990s leading up to this Equal Treatment Act had been dominated by the (hypothetical) case of a stricly religious school wishing to refuse employment to a known practising homosexual. The compromise in the Dutch legislative text is almost as unclear as the one in the Framework Directive discussed by Mark Bell. It is certainly quite untranslatable. (See for an English translation of Article 5 of the Equal Treatment Act: www.cgb.nl .)

It took more than five years before a case came up to test the compromise. Now the Commission seemed so happy at last to have a case [96-39], that they were willing to ignore the fact that the school body had not really discriminated, but just recommended against a certain appointment. The Commission concluded that the school body had not been clear enough about its policy towards the applicant, and that therefore it had been unlawful not to have wanted to employ him. It is still the only getting-or-losing-a-job case in which the Commission found a discrimination on the ground of sexual orientation.

Cases about employment benefits for partners

All the other 17 emploment cases were about spousal employment benefits for partners. Interestingly, the years 1994-2001 are precisely the seven years that the Dutch debate about law and homosexuality was dominated by the issues of registered partnership, and the opening up of marriage for same-sex couples. One of the heterosexual cases [99-13] before the Commission was about whether or not you could get extra days off if you went to register your partnership (around your wedding day you normally can get five extra days off from most employers). The employer in question said that only same-sex couples would get days off for their partnership registration, because different-sex couples could have those extra days when they would choose to marry, an option which was then not yet available to same-sex couples. The Commission disagreed: this was a clear case of discrimination on the basis of sexual orientation and on the basis of civil status, because the employer distinguished between marriage and registered partnership and between homosexual and heterosexual couples.

There were also some cases about travel benefits (like in the Lisa Grant case, decedid by the Court of Justice of the EC). All these had to do with travelling outside the Netherlands. Dutch Rail provides free travel in the Netherlands for your partner if you work there. If you are married you also get free travel beyond the Dutch borders (based on an agreement with foreign railway companies). Was this a condition of Dutch employment, was it covered by Dutch law? [99-04] The Commission found (and this was reaffirmed by the courts) that if certain foreign railway companies did not provide free travel for same-sex unmarried partners of Dutch Rail employees, then Dutch Rail should pay the full travel costs of these partners in those foreign countries.

More importantly, 13 of the cases were about pensions, traditionally only paid out to married widows (and to married widowers). Most pension funds now also pay out to unmarried surviving partners, but not all. The General Equal Treatment Act, in one of its many exceptions, provides that distinctions between married and unmarried people in the field of pensions are not (yet) prohibited. For that reason the Commission had to disappoint several complainants about discrimination in this field. In one case [99-08] the amount of premium you had to pay was dependent on the sex and the life expectancy of your partner, and for men their partner was deemed to be a woman (with an accordingly high life expectancy). In this case the male complainant had a male partner, but he still had to pay the extra premium as if his male partner were female. The Commission agreed this was discrimination based on sexual orientation.

In the total of 25 employment cases the Commission only 7 times concluded that there had been discrimination.

Cases about medical services

There have been 14 cases involving the provision of services. (The one case [96-83] about "goods" was concerned with tax, so the Commission declared itself not competent to give an opinion about it.)

Seven of these 14 cases were about medical services, putting highly controversial questions before the Commission: Can homosexual men be refused to donate blood, or sperm? Can heterosexuals be refused to get a free vaccine against hepatitis B? Can a compensation scheme for HIV infected people be limited to people who got it through blood products for haemophiliacs, thus excluding compensation for people who probably got the virus through sexual contact? Can in vitro fertilisation treatment (IVF) be refused to lesbian women?

With the exception of the IVF case, all these medical cases were thrown out for the same reason as I mentioned earlier with respect to the case of the transgenderist. The Commission ruled that the distinction made did not amount to unlawful direct discrimination, because the real reason for excluding or including a certain group had been a medical one. The Commission still considered the distinction made as possible indirect discrimination, but ruled that reasons of health justified it.

The seventh medical case [2000-04] was started by the Commission itself, using its power to to investigate a certain field of society. The investigating dealt with the eight hospitals in the Netherlands that provide in vitro fertilisation treatment. It appeared that some of these hospitals

refused the treatment to unmarried women, to single women and or to women with female partners. In its opinion the Commission did not use the medical exception they had created in the other cases, probably because the exceptions were not so much based on reasons of health, but on morals (although some hospitals clearly thought it healthier for a child if it also had a "father" present in the house). The Commission ruled that it is always unlawful in this field to discriminate against women whose partner is female, that it is always unlawful to discriminate against women who are not married to their partner, and that depending on the actual reasons use it may also be against the law to discriminate against single women. This was one of the most controversial opinions of the Commission so far.

Cases about other services

The seven cases involving non-medical services all led the Commission to a finding of unlawful discrimination. The most famous case [97-135] was about education. A Catholic Theological College gave credits to students for some voluntary work: they could form and participate in theme groups. After a while two homosexual theme groups were formed, called *San Sebastian* and *Sappho*. The College then decided that students would not get credit for taking part in either of those two groups. The students took the case to the Commission. The Commission ruled that this was clearly direct discrimination on the basis of sexual orientation. There may be a certain (vaguely worded) exception in the General Equal Treatment Act for religious ethos organizations, but that only applies to them in their capacity of employers. In their capacity of service providers their activities were not excluded from the full impact of the law. Another famous case [97-29] was that of a dance school refusing same-sex dancing by their students. The Commission ruled that this was direct discrimination on the basis of sex.

Conclusion

The overall picture is that many fields have been exempted from the work of the Commission by the text of the General Equal Treatment Act itself. On top of that, a medical exception has been created by the Commission. Complaints in the field of employment, especially with respect to getting or losing a job, are only rarely successful. The same applies to the field of medical of services. In the field of some spousal employment benefits there have been certain successes. In the field of non-medical services including education, complainants have been very succesful before the Commission.

So what does this mean? It certainly shows that even in the Netherlands, even in a country as advanced, as liberal and as gay friendly as the Netherlands, there are still cases which can and should be seen as anti-homosexual discrimination. So it is not quite Paradise, yet. And for some categories of those cases, especially like the small things like the dance school and the curious elements in pension schemes, the Commission can be quite useful in spelling this out, so that the institutions which have discriminated may be led to change its policy or its rules. In the more complicated things, like most employment issues are, the Commission is less successful, and perhaps here the Dutch Commission compares quite badly to the Swedish Ombudsman, which seems to have a wider range of competences, especially in advising the courts and advising the government. I would hope that the Dutch Commission and all those other 13 or 14 Commissions or Ombudsmen which ideally should spring from the Framework Directive throughout the European Union, would be not just like a sort of quasi court, but also a bit like a quasi public prosecutor, and like an advisory body. To deal with situations which are more complex than just tiny, straightforward examples of discrimination, you really need to look at the whole situation rather than just the discrimination aspect, but you need the special insight into the discrimination aspect to make that clear in the whole context.

The types of cases which have been brought before the Commission, seem to reflect what can be expected in a country where the structure of law and the culture of society are largely gay friendly (if not quite paradise, yet).

- Firstly, in such a country you will still encounter **subcultural discriminations**, mostly in religious hospitals and schools, and also in the field of verbal discrimination.
- Much more important than the subcultural forms of discrimination which still pop up from time to time (in certain pockets of resistance against the new gay-friendly culture), are what you could call **suprastructural discriminations**. There used to be a structure of heterosexually inspired legislation, and on top of that various things have been built (like pension schemes) that will still be around in the era after the structure itself has changed. And I think the dance schools are examples of the same phenomenon: there students are required to dance heterosexually because in former days you could only marry someone of the opposite sex.
- A third category, if you can bear with my academic tendency to categorise everything just a little longer, may be that of **physical discriminations**. As in the case of racial discrimination, the closer to the body the service or the employment is, the more likely some discrimination issues will arise. The controversial cases about blood donation, vaccination and certainly about in vitro fertilization, all have to do with sex and/or reproduction and these two things tend to be slightly different in gay and lesbian circles than in heterosexual circles, so there really is a debate to what degree these bodily differences should be reflected in the treatment of individuals.
- A fourth category is that of **foreign discriminations**. People in the Netherlands can be affected by discriminations taking place elsewhere, like the foreign rail travel example showed.
- And fifthly, there may be a category of **subliminal discriminations**. In some situations which have gone wrong, where people started to shout and fight and behave less wisely, and where no one can really reconstruct what has happened, there may well have been some discrimination, but it will be difficult to get sufficient evidence that one party has treated someone else differently in the awkward situation then he or she would have treated a person pereceived as heterosexual.

I think that all cases that have come before the Dutch Equal Treatment Commission, fall into one of these five categories of discrimination, and that they are typical for countries like the Netherlands. Perhaps this offers some guidance for some of the seven countries in the European Union which now already have legislation against sexual orientation discrimination. Of course there are also countries in the European Union which on their own were not ready for antidiscrimination legislation, and now they suddenly have to enact antidiscrimination legislation. There may well be much bigger problems of sexual orientation discrimination in these countries. And perhaps some of these problems can not be tackled by an informal, non-binding, quasi-judicial commission like the Dutch example. Nevertheless I would recommend that even those countries should have both Courts and a Commission competent to deal with anti-homosexual discrimination, plus some firm bridges between them.